James anak Jack & Ors v Ting Kuok Hua

HIGH COURT (SIBU) — CIVIL APPEAL NO 12–18 OF 2004
SANGAU GUNTING J
18 MAY 2006

Civil Law Act — Damages — Fatal accident — Whether the plaintiff falls within the ambit of s 7(2) of the Civil Law Act 1956 — Whether the plaintiff and his sister have shown on the balance of probabilities that they have suffered financial loss consequential to the deceased's death — Civil Law Act 1956 s 7(2)

The respondent's claim against the appellants arose out of a collision between a lorry tanker driven by the first appellant and a land cruiser driven by the respondent's father, the deceased. The accident occurred on or about 14 December 2000 at or about 9am. The lorry tanker was owned by the second appellant who at the material time employed the first appellant. The respondent being the son of the deceased brought an action as the administrator of the estate for the benefit of and on behalf of himself and on behalf of his sister under s 7 of the Civil Law Act. The respondent alleged negligence on the part of the first appellant. Alleging the deceased had suffered pain and suffering, the plaintiff averred as a result of the accident, the deceased suffered severe chest and abdominal injuries associated with the road traffic accident from which he died later. Being dependants the respondent says he and his sister have suffered loss of support, in that they have been deprived of the pecuniary benefits which they would have received had the deceased continued to live and have incurred expenses and suffered damages for bereavement. The finding of 100% liability on the part of the first appellant and the consequential vicarious liability on the part of the second appellant was not disputed. The appeal was on the quantum of damages.

Held, allowing the appeal:

(1) Based on the evidence of the respondent considered in the context of the respondent's pleadings and the requirement of proof on the balance of probabilities, there was no credible evidence that the respondent and his sister were dependent on the deceased. The respondent and his sister have not shown on the balance of probabilities that they have suffered financial loss consequential to the deceased's death. In addition, with the coming into effect on 1 October 1984 of the Civil Law (Amendment) Act 1984, the deceased's estate could no longer claim for loss years earnings in respect of any period after that person's death (s 8(2) of the Civil Law (Amendment) Act 1984) (see para 17 & 18).

(2) The plaintiff had failed to prove the deceased's living expenses. The dependants could only claim the amount of the money advanced to them after making a

deduction of the said expenses. In proving the deceased's living expenses, the respondent would have perhaps also shown the remaining amount a portion of which was presumably advanced to the respondent. In this connection, there must be sufficient proof not only to show the amount of money advanced to the respondent but also to show that amount actually constituted the loss of support claimed for. In other words, to show that the claim for loss of support was actually the amount sustained by the plaintiff and his sister as dependants. This cogent evidence would appear to be lacking (see para 20).

(3) There was no evidence as to whether or not the deceased was conscious after the collision and before he died. On the contrary, on the balance of probabilities the evidence seemed to indicate that the deceased died on the spot. There was no basis for the award for pain and suffering (see para 24).

[Bahasa Malaysia summary

Tuntutan responden terhadap perayu-perayu berbangkit dari satu perlanggaran di antara sebuah lori tanker yang dipandu oleh perayu pertama dan sebuah 'land cruiser' yang dipandu oleh bapa responden, simati. Kemalangan tersebut berlaku pada 14 Disember 2000 pada lebih kurang jam 9 pagi. Lori tanker tersebut dipunyai oleh perayu kedua yang pada masa material bekerja dengan perayu pertama. Responden sebagai anak kepada simati membawa tindakan ini sebagai pentadbir harta pusaka bagi pihak dan kepentingan dirinya sendiri dan juga adiknya di bawah s 7 Akta Undang-undang Sivil. Responden menuduh perayu pertama cuai. Beliau mendakwa yang simati telah menanggung kesakitan dan kesengsaraan akibat dari kemalangan tersebut, simati mengalami kesakitan dada yang teruk dan kecederaan abdomen yang berkait dengan kemalangan yang mengakibatkan kematiannya. Sebagai orang dibawah saraan, responden mengatakan yang beliau dan juga adiknya telah mengalami kehilangan tempat bergantung dan bahawa mereka telah kehilangan kepentingan wang yang mana mereka akan terus menerima sekiranya simati terus hidup dan mereka telah menanggung perbelanjaan dan kerugian kerana berkabung. Keputusan liabiliti 100% pada pihak perayu pertama dan liabiliti vikarius pada pihak perayu kedua tidak dipertikaikan. Rayuan adalah mengenai jumlah gantirugi.

Diputuskan, membenarkan rayuan:

(1) Berdasarkan keterangan responden yang dipertimbangkan dalam konteks pliding responden dan keperluan bukti pada imbangan kebarangkalian, tidak terdapat keterangan yang boleh dipercayai yang responden dan adiknya adalah tanggungan simati. Responden dan adiknya tidak membuktikan pada imbangan kebarangkalian yang mereka menanggung kerugian kewangan akibat dari kematian simati. Tambahan lagi, dengan berkuatkuasanya dari 1 Oktober 1984 Akta Undang-Undang Sivil (Pindaan) 1984, estet simati tidak lagi dapat menuntut kehilangan tahun pendapatan berhubung dengan sebarang tempoh selepas kematian (s 8(2) Akta Undang-Undang Sivil (Pindaan) 1984) (lihat perenggan 17 & 18).

(2) Plaintif gagal membuktikan perbelanjaan kehidupan simati. Defendan-defendan hanya dapat menuntut jumlah wang yang diberikan kepada mereka selepas membuat tolakan perbelanjaan tersebut. Dalam membuktikan perbelanjaan kehidupan simati, responden juga mungkin perlu menunjukkan jumlah yang dianggap diberikan kepada responden. Berhubung dengan ini, mestilah terdapat bukti yang cukup yang menunjukkan bukan sahaja jumlah wang yang diberikan kepada responden, tetapi juga perlu ditunjukkan yang jumlah tersebut benar-benar merupakan kehilangan saran yang dituntut. Dalam lain perkataan, hendaklah ditunjukkan bahawa tuntutan kehilangan saraan sebenarnya adalah jumlah yang dialami plaintif dan adiknya sebagai defendan. Keterangan yang mustahak ini tampaknya mencukupi (lihat perenggan 20).

(3) Tiada keterangan samada simati sedar selepas perlanggaran dan sebelum beliau meninggal dunia. Sebaliknya, pada imbangan kebarangkalian keterangan menunjukkan bahawa simati meninggal dunia ditempat kejadian. Tiada asas untuk memberi award untuk kesakitan dan kesengsaraan (lihat perenggan 24).]

Notes

For cases on fatal accident, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 3668–3705.

Cases referred to

Chan Chin Ming v Lim Yok Eng [1994] 3 MLJ 233 (refd)
Low Yoke Ying & Anor v Sim Kok Lee & Ors [1991] 2 MLJ 104 (refd)
Maimunah & Anor v Abu Bakar & Anor [1964] MLJ 223 (refd)
United Plywood and Sawmill Ltd v Lock Ngan Loi [1970] 2 MLJ 237 (refd)

Legislation referred to

Civil Law Act 1956 ss 7(2), (3)(iv)(c), (11)
Civil Law (Amendment) Act 1984 s 8(2)

Edward Liong Tien Yiu (Battenberg & Talma Advocates,,Miri) for the appellants.
Stephen HG Chung (Stephen Robert & Wong Advocates, Sibu) for the respondent.

Sangau Gunting J:

[1] The respondent's claim against the appellants arose out of a collision between a lorry tanker driven by the first appellant and a land cruiser driven by the plaintiff's father, the deceased. The accident occurred 'on or about the 14th day of December 2000 at or about 9.00 am.' The lorry tanker was owned by the second appellant who at the material time employed the first appellant. The plaintiff being the son of the deceased brings the action as the administrator of the estate 'for the benefit of and on behalf of himself and on behalf of his sister under… s 7 of the Civil Law Act.' The respondent alleged negligence on the part of the first appellant.

A **[2]** Alleging the deceased had suffered pain and suffering, the plaintiff avers as a result of the accident, the deceased suffered severe chest and abdominal injuries associated with the road traffic accident from which he died later.

[3] Being dependants the plaintiff says he and his sister have suffered loss of **B** support, in that they have been deprived of the pecuniary benefits which they would have received had the deceased continued to live and incurred expenses and suffered damages for bereavement. The plaintiff and his sister were then 22 and 24 years old respectively.

C **[4]** The plaintiff says the estate of the deceased had suffered loss and damage and had incurred expenses. At the time of death the deceased was 48 years old, in good health and was working as a driver with the Public Works Department, Sibu. The plaintiff avers the deceased's net salary was about RM1,117.51 per month, his total EPF contribution was RM290.00 per month and was paid an average of RM500.00 per month as overtime pay. The plaintiff further avers the deceased used **D** to give to the plaintiffs RM600.00 per month for household expenses and RM280.00 per month for the house rental.

[5] In summary, the plaintiff as administrator on behalf of himself and his sister and on behalf of the estate claims against both (appellants/defendants): special **E** damages (totalling RM5,330.00), general damages on behalf of the estate, damages for bereavement, damages on behalf of himself and his sister, interest and costs.

FINDING OF THE SESSIONS COURT JUDGE

F **[6]** The finding of 100% liability on the part of the first appellant and the consequential vicarious liability on the part of the second appellant is not disputed. The appeal against the judgment of the learned sessions court judge focuses on the quantum of damages.

G **[7]** The appellants have agreed to the amount of special damages and the respondent conceded that the bereavement under s 7(3)(B) of the Civil Law Act is not awardable.

[8] The first ground of appeal concerns an alleged misdirection whereby the **H** learned sessions court judge initially first made a finding that the plaintiffs have failed to prove their dependency claim and yet she proceeded to award the general damages based on a formula (55–48) / 2 and the multiplier of 3.5 years. This, the appellants" counsel says is the formula for the determining of dependency claim under s 7 of the CLA. Implicit in learned counsel's submission seems to be that the learned sessions **I** court judge ought to have confined herself to the issue emanating from para 13 of the statement of claim which specifically concerns the plaintiffs and his sister's claim for loss of support: whether the plaintiff falls within the ambit of s 7(2) of the CLA.

[9] Section 7(11) of the CLA provides that "child" includes son, daughter, grandson, grand-daughter, stepson and stepdaughter. The underlying emphasis in

this provision seems to be the nature of the family relationship between the deceased and those who claim to be the deceased's dependants. Whether the children or grandchildren or stepchildren who claim to qualify as dependants under s 7 ought to be below a certain age seems not at all clearly indicated except for the use of the word "child" under s 7(2) of the CLA. In any case, even the ordinary dictionary definition of "child" includes not only 'a boy or girl between birth and puberty' but also includes 'a son or daughter' *(Collins Concise English Dictionary, Harpers Collins Publishers 1992).* Quite clearly, a son or a daughter must not necessarily be below 18 years of age. The learned sessions court judge quoted a dictionary meaning of 'childhood' but with respect, the focus of concern should have been the meaning of 'child' for the purpose of the said s 7(2) and not 'childhood'.

[10] Based on the facts of the instant case, the deceased being 48 years old at the time of his demise and the plaintiff and his sister being at the material time the deceased's children, the remaining issue concerning dependency claim would appear to be whether the plaintiff and his sister have shown on the balance of probabilities that they have suffered financial loss consequential to the deceased's death. As was said in *Chan Chin Ming v Lim Yok Eng* [1994] 3 MLJ 233 at p 241, '… a plaintiff can only claim in such a case for financial loss which he sustains as a dependant and not in.any other way.'

[11] And actually the learned sessions court judge, despite of her finding to the effect that each of the respondent and his sister being at the material time no longer below 18 years of age could no longer be considered as a 'child' for the purpose of s 7 of the CLA, nevertheless proceeded to consider the issue whether or not there was credible evidence that both children of the deceased were dependants. Towards that end she considered the fact that the plaintiff was at the material time already 24 years old and already earning RM500.00 per month as a general worker/ trainee. She appears to have also taken into account the fact that at the time of the trial, the respondent was already employed as a Rotary Quality Controller at Sanyan Wood Industries drawing a salary of presumably RM1,000.00 per month. As to the respondent's sister, the learned sessions court judge said in her judgment that 'she was already about 25 years old and was married and she never came to testify … to prove her dependency claim.'

[12] It would appear therefore that the learned sessions court judge was wrong in law when she said that 'child' under s 7(2) meant a child below 18 years old. And so as earlier adumbrated, the main issue should be whether financial loss has been sustained by the respondent and his sister as a result of the death of their father, the deceased.

[13] Implicitly answering this issue in the positive, learned counsel for the respondent refers to the following portion of the respondent's evidence in chief: Before my father passed away, I stayed with my father. It was in a rented house. The rental was paid by my father. Rental was RM300.00 per month. Only we two, my father and I stayed at the rented house. I have a sister. She was 25–26 years old when my father passed away. She was already married then. My father paid for all the expenses, food, water and electric bills.

[14] The respondent went on to testify in cross-examination that at the time of his father's death he was about 21 years old and that he moved out of the rented flat at No 20B, Jalan Foochow, Sibu in March.2001 because 'The rent was expensive …' He further testified to the effect that he moved out to 10B, Lane 1, Jalan Kapur where rental was then RM150.00 per month and that he got married on 15 May 2003. Cross-examined further, he replied to the effect that at the time of his father's death he was not financially independent but now I have to be financially independent. The issue remains, as earlier stated, whether the plaintiff and his sister have shown on the balance of probabilities that they have suffered financial loss consequential to the deceased's death.

[15] The learned counsel for the appellants contend that the respondent must presumably in the context of his pleadings positively establish how much the deceased gave him. He further says, 'only by positively identifying the amount can the court come to a finding based on that amount. It is certainly not the function of the court to 'guess' how much if all the plaintiff in this case said … *the deceased (father) who paid for the rentals and all expenses including food, water and electric bills.'* This guesswork could vary from a RM100.00 … to RM2,000.00 … How can this court make a determination? … Due to this variable, even the respondent's counsel is not sure … the respondent said 'In the event the calculation or quantum of the sessions court judge is not correct, this honourable court can adjust the quantum awarded because this appeal is by way of re-hearing'.

[16] The appellants' counsel goes on to submit to the effect that the sessions court judge's finding of there being no credible evidence that plaintiff …. and his sister … were dependent on the deceased was made after (a) hearing the plaintiff's evidence, (b) the plaintiff's sister not bothering to turn up in court to prove her dependency, (c) no documentary evidence was produced in court to support the plaintiff's pleading that the deceased gave the plaintiffs RM600.00 per month for household expenses and RM280.00 per month for rental, (d) no landlord was called to corroborate the plaintiff's evidence that the rental was RM300.00 per month, (e) this evidence of the rental being RM300.00 per month was already in contradiction to the pleadings which state the monthly rental to be RM280.00. In this connection, the learned counsel also pointed out that there was no evidence which led to the lifestyle of the deceased and the plaintiff never exactly said how much money the deceased gave him.

[17] On this aspect of the appeal, I am inclined to agree with the submission by the appellants' counsel and am of the view that based on the evidence of the plaintiff considered in the context of the plaintiff's pleadings and the requirement of proof on the balance of probabilities, the learned sessions court judge was correct when she said in her judgment: 'Further there was no credible evidence that the plaintiff, Ting Kuok Hua and his sister Ting Nguok Ming (f) were dependent on the deceased.' It seems quite clear that such a finding is in addition to her finding that the plaintiff and his sister each being no longer a 'child' are ineligible to claim for dependency under the CLA. Although as earlier pointed out that the learned session court judge was wrong in her conclusion concerning the age limit aspect, she was correct in her finding that the plaintiff and his sister were not dependants in the context of the issue

whether the plaintiff and his sister have shown on the balance of probabilities that they have suffered financial loss consequential to the deceased's death.

[18] The appellants' counsel pointed out, correctly in my view, that with the coming into effect on 1 October 1984 of the Civil Law (Amendment) Act 1984, the deceased's estate could no longer claim for loss of years earnings in respect of any period after that person's death (see s 8(2) Civil Law (Amendment) Act 1984).

[19] In case I am wrong in upholding the finding of the sessions court judge that '…there was no credible evidence that the plaintiff … and his sister … were dependent on the deceased', I would proceed to deal with the appellants' alternative contention based on failure on the part of the sessions court judge to take into account the diminution of any such amount which is of the living expenses of the person deceased at the time of his death as provided under s 7(3)(iv)(c). In connection thereto, the learned counsel for the appellants states that the plaintiffs failed to prove the living expenses of the deceased person in accordance with s 7(3)(iv)(c) and that the sessions court judge failed to take away or minus from the dependency award any diminution of the living expenses of the deceased person. She has awarded the sum AS IF THERE ARE NO LIVING EXPENSES. Such an award is WRONG IN LAW citing in support *United Plywood and Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237.

[20] Based on s 7(3)(iv)(c) the learned sessions court judge in any case should have deducted an amount representing the deceased's living expenses. But as the appellants" counsel rightly pointed out it would appear the plaintiff had failed to prove the deceased's living expenses. As was said in *Assessment of Damages in Personal Injury and Fatal Accident Claims: Principles and Practice by Lim Heng Seng.*

[20] The dependants can only claim the amount of the money advanced to them after making a deduction of the said expenses. In the circumstances of this case, it would appear that in proving the deceased's living expenses, the plaintiff would have perhaps also shown the remaining amount, a portion of which was presumably advanced to the plaintiff. In this connection, there must be sufficient proof not only to show the amount of money advanced to the plaintiff, but also to show that that amount actually constitutes the loss of support claimed for. In other words, to show that the claim for loss of support is actually the amount sustained by the plaintiff and his sister as dependants (*Chan Chin Min & Anor v Lim Yok Eng* [1994] 3 CLJ 687). As I have earlier indicated, I agree with what seems to be implicit in the learned sessions court judge's judgment that concerning this issue, cogent evidence would appear to be lacking. In the premises, the award under 'Assessment of Damages' of her judgment (p 57 of the record of appeal), particularly (a), (b) and (c) thereunder would have to be set aside.

[21] The appellants" counsel says there is no basis for the session court judge's award of RM30,000.00 for pain and suffering. To support his contention that the deceased died on the spot, he refers to the following pieces of evidence: the relevant death certificate indicating date and time of death to be 14 December 2000 at 9.30 am, PW2's (Ta Leong Huat's) police report stating the time of the occurrence of

A accident to be 9.00 am and that the deceased 'dipercayai … mati di tempat kejadian … ', PW2's evidence of having seen 'the driver (the deceased) actually died on the spot', DWl's (James ak Jack's) police report stating the time of the occurrence of the accident to be 9.00 am, DW1's evidence of having gone to the land cruiser and saw the driver 'already dead' and PW1's (the plaintiffs) testimony that his father 'had already passed away when (he) saw him at the hospital.'

B

[22] In support, the appellants' counsel cites the case of *Low Yoke Ying & Anor v Sim Kok Lee & Ors* [1991] 2 MLJ 104 in which, it was held, inter alia: 'As to the estate's claim for damages, since there was no evidence as to whether the deceased was conscious or unconscious after the accident and before he was pronounced dead about an hour later, no award was made for pain and suffering. Also cited is *Maimunah & Anor v Abu Bakar & Anor* [1964] MLJ 223 where it was stated 'As death was instantaneous there was no claim for pain and suffering.'

C

[23] The respondent's counsel contends the deceased died half an hour after the collision ie at 9.30 am. Learned counsel submits, 'From the time of collision to the time of his death, the deceased was severally injured and in pain. The deceased had sustained pain and sufferings.'He said the deceased did not die on the spot but rather at the scene of the accident. No case authority was cited in support.

D

[24] Based on the evidence referred to and the cases cited by the appellants" counsel, with respect, I must agree with the implicit contention of the learned counsel for the appellants that there was no evidence as to whether or not the deceased was conscious after the collision and before he died. On the contrary and on the balance of probabilities the evidence seems to indicate that the deceased died on the spot.

E

F For the above mentioned reasons, with due respect to the learned counsel for the respondent, the appeal must be allowed to the extent as adumbrated above. In view of my decision, perhaps I should ask both parties to submit further on the issue of costs.

G *Appeal allowed.*

Reported by Peter Ling

H

I